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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR MATTHEW CONNER,

Defendant and Appellant.

C062473

(Super.Ct.No.
NCR75495)

Defendant Victor Matthew Conner was responsible for watching his girlfriend Samantha E.'s 14-month-old daughter, T.S., while Samantha went to an appointment. During the 15 to 20 minutes Samantha was gone, T.S. suffered two broken ankles, a fractured shoulder, a concussion, a black eye that was swollen shut, and injuries to the inside of her upper lip and around her left ear, all at the hand of defendant.

A jury found defendant guilty of child abuse (Pen. Code, § 273a, subd. (a)) and corporal injury on a child (Pen. Code,

§ 273d, subd. (a)), and further found that defendant personally inflicted great bodily injury on a child under five years of age in the commission of those crimes (Pen. Code, § 12022.7, subd. (d)). Defendant admitted two prior prison term allegations. The court denied probation and sentenced defendant to 14 years in state prison. The court imposed specified fees and fines, and awarded defendant 242 actual custody credits plus 36 conduct credits for a total of 278 presentence credits. Defendant filed a timely notice of appeal.

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and asks us to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a three-page supplemental letter brief raising complaints about his trial counsel.

DISCUSSION

Defendant asserts his trial counsel failed to (1) visit him in jail or "go over" the case with him, (2) investigate the case or call witnesses to refute evidence against him, (3) subpoena telephone records to refute evidence against him, and (4) put on evidence to refute the prosecution's argument of a pattern of abuse by him.

Defendant cites no facts to support his claims. He fails to provide the names of the witnesses who would have refuted

evidence against him. He fails to explain how telephone records would have "disqualified" evidence against him. He also fails to provide facts regarding his claim that he was not present during two of the three prior incidents in which the victim was hurt, other than to concede that Samantha in fact testified in that regard.

Moreover, the record contains no factual support for defendant's claims. Indeed, the record shows that, throughout the trial, defense counsel vigorously represented his client. He cross-examined the People's witnesses and put on a witness for the defense. In particular, counsel cross-examined Samantha and nearly every other percipient witness regarding whether defendant was present during any particular incident. Whether testimony as to his presence or absence was credible to the jury was not within counsel's control.

"Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission. In all other cases the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence . . . may be taken to determine the basis, if any, for counsel's conduct or omission. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581-582.) Assuming defendant provided the names of possible witnesses as he claims, there may have been plausible tactical reasons supporting counsel's decision not to call those witnesses to testify. Counsel may have felt that testimony from those witnesses could potentially

be more detrimental than beneficial to defendant's case. In any case, the record does not affirmatively disclose that counsel had no rational tactical purpose for not calling additional witnesses. As a result, this court is in no position to afford defendant any relief.

Defendant also makes a somewhat confusing request for an extension of time "to file a [writ of] [h]abeas [c]orpus in conjunction with [his] direct appeal." To the extent defendant seeks habeas corpus relief based on the appellate record, he has an adequate remedy via his direct appeal. (*In re Waltreus* (1965) 62 Cal.2d 218, 225.) To the extent he seeks to rely on information outside the appellate record to support the claims asserted in his supplemental brief, his recourse is to file a petition for habeas corpus in the trial court. (*People v. Fosselman, supra*, 33 Cal.3d at p. 582; *People v. Ledesma* (2006) 39 Cal.4th 641, 746.) Defendant's request is denied.

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised (without additional briefing) whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence conduct credits. In the recent opinion of *People v. Brown* (2010) 182 Cal.App.4th 1354, 1365, this court concluded the amendments apply to pending appeals. However, defendant was convicted of a felony in which he inflicted great bodily injury on the victim. (Pen. Code, § 12022.7, subd. (d).) Thus, the recent amendments to section 4019 do not operate to modify his entitlement to credit.

(Pen. Code, §§ 2933.1, subd. (a), 4019, subds. (b)(2), (c)(2) & (f); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)

In addition to reviewing arguments set forth in defendant's supplemental brief, we independently examined the record and find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P. J.

We concur:

SIMS, J.

BUTZ, J.